In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1404

JESUS ENRIQUE NORIEGA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial with one Revuelta in the United States District Court for the District of Nevada, petitioner was convicted on two counts involving illegal dealings in unlawfully imported cocaine in violation of 21 U.S.C. 174 and three counts of transferring cocaine without a written order form, in violation of 26 U.S.C. 4705(a). On March 5, 1970, he was sentenced to concurrent terms of five years' imprisonment on each count. The court of appeals affirmed *per curiam* (Pet. Ex. A).

The evidence showed that on February 17, 1969, undercover narcotics agents Alden and Tarallo met with petitioner and Revuelta for the purpose of purchas-

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ing cocaine. The agents requested 200 "spoons" but were told that only 25 spoons were then available (Tr. 51–53).[1] When petitioner was asked the source of the cocaine, he replied that it had come from Spain (Tr. 57, 145). Petitioner informed the agents that they could purchase 25 spoons at that time and that the remainder would be supplied "later on" (Tr. 56). The agents declined and no sale occurred that day (Tr. 57).

At about 3:00 a.m. the next morning (February 18), the agents again met with petitioner and Revuelta (Tr. 67). At this meeting, they purchased 25 spoons of cocaine and agreed to buy an additional 200 spoons (Tr. 70–72, 148–149). Petitioner told agent Tarallo that the 200 spoons would be available within the next few days. When agent Tarallo asked how he could get in touch with petitioner or Revuelta, the latter gave him a business card with a telephone number written on it (Tr. 82). That evening the agents met with petitioner, who told them that the 200 spoons had not yet arrived. Petitioner gave agent Tarallo a telephone number at which he could be reached and said that in a few days he would have the cocaine (Tr. 87). During the next month, a series of telephone conversations took place between agent Tarallo and Revuelta concerning the expected arrival of the 200 spoons of cocaine.

On March 19, 1969, agent Tarallo was informed by Revuelta that he had seven ounces of pure cocaine from Peru (Tr. 161). The next day Revuelta advised agent Tarallo that petitioner would be calling him

[1] "Tr." designates the 2-volume trial transcript which we are lodging with the Clerk.

(Tr. 163). Petitioner did so and set up a meeting at which he produced a sample of the cocaine; he said it had come from Peru and was available for $7,000 (Tr. 169–171).

Later that evening petitioner called agent Tarallo and scheduled a meeting for 11:15 that night. At this meeting, petitioner advised the agents that the cocaine was a short distance away. The three then went to a coffee shop parking area where petitioner's car was located. Upon entering the vehicle, petitioner produced ten ounces of cocaine, stating that the drug had come from Peru. When the agents opened the trunk of the government vehicle, purportedly to obtain the $7,000 to pay for the purchase, other agents converged on the scene and arrested petitioner (Tr. 172–174).

Petitioner appears to contend, as he did below, that the comments made by the trial judge regarding agent Tarallo's telephone conversations with Revuelta subsequent to February 18 confused the jury and prejudiced petitioner. At trial, defense counsel for Revuelta (but not for petitioner) had objected that this testimony was not relevant to Revuelta's guilt on the ground that he had not been charged with any transactions other than those occurring on February 18 and that a proper foundation for the admission of the testimony relating to the telephone conversations had not been laid (Tr. 177). This objection was overruled (Tr. 187). During the trial, the judge instructed the jury that the testimony relating to the telephone conversations was not admissible against Revuelta, but that the evidence could be considered against petitioner on

the three counts which dealt with events occurring after February 18 (Tr. 186–187). The trial judge later decided that his earlier instruction was incorrect as to Revuelta and, in his final charge, instructed the jury that the telephone conversations could be considered against Revuelta for the limited purpose of establishing his intent (Tr. 384–385).

The court's final instruction correctly stated the law. Moreover, any remaining ambiguity affected only Revuelta and not petitioner.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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